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No. 90-883

In the

Supreme Court of the United States

October Term, 1990

LEONARD C. JOHNSON, CRNA, LUTHER HOSPITAL, ST. PAUL FIRE & MARINE INSURANCE COMPANY, and WISCONSIN PATIENTS COMPENSATION FUND,
Petitioners,

v.

RICKY F. RINECK, Individually, as surviving husband of Joy E. Rineck, and as guardian for Rachel J. Rineck, a minor,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court will review a state supreme court's construction of state statutes in a case where constitutional arguments were raised for the first time in a motion for reconsideration and the state supreme court refused to consider them.

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OPINIONS BELOW

The petition accurately cites the opinions below.

JURISDICTION

Jurisdiction is sought under 28 U.S.C. § 1257(a). As discussed in Part I of the Argument below, Respondents contend this Court lacks jurisdiction because the federal question was not timely raised.

STATEMENT OF THE CASE

This case involves injuries to a child and the death of her mother on account of admitted medical malpractice during the child's delivery by cesarean section on January 27, 1986. Petitioners are the involved nurse anesthetist, the hospital, and their insurers. Respondents are the surviving spouse and his birth-injured child.

In Wisconsin, claims for "injury or death on account of malpractice" are controlled by Wisconsin Statutes Chapter 655, the Health Care Liability and Patients Compensation Act.[1] In April, 1986, Respondents filed suit under that law. The damages Respondents sought included compensation for the father's loss of spousal society and companionship. Chapter 655 subjects all noneconomic loss claims for injury or death on account of malpractice to a $1,000,000 limit.[2]

By agreement, the claims involving the mother's death and those involving the child's injuries were bifurcated and the former were scheduled for trial. Five months before trial, in January, 1988, Petitioners moved (R18) to further restrict the father's claim for loss of spousal society and companionship by arguing that the noneconomic loss

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[1] Wisconsin Statutes Section 655.007 provides:

> On or after July 24, 1976, any patient or the patient's representative having a claim or any spouse, parent or child of the patient having a derivative claim for injury or death on account of malpractice is subject to this chapter.

[2] These capping provisions, Wisconsin Statutes Sections 655.017 and 893.55(4), are set forth in the Petition at 3-4.

limitation contained in Wisconsin's general wrongful death statute[3] should be grafted onto the $1,000,000 limit already imposed by Chapter 655. Petitioners presented the issue to the trial court as "a straightforward case of statutory interpretation, in which constitutional issues did not need to be raised," *Petition* at 25. After oral arguments, the trial court issued a Memorandum Order[4] on March 9, 1988, in which Petitioners' motion was denied. The trial court held that, in medical malpractice actions involving death, the general wrongful death statute's limitation on loss of society and companionship is preempted by the conflicting limit imposed by the medical malpractice laws.

After trial resulted in a jury award of $250,000 for loss of spousal society and companionship, Petitioners renewed their motion (R45) to impose the general wrongful death noneconomic damages cap. They again chose to cast the issue solely in terms of statutory construction. The motion, again, was denied.

Petitioners then took the issue to Wisconsin's intermediate court of appeals. In their briefs to the Wisconsin Court of Appeals, Petitioners continued to treat the question of conflicting damages caps as one involving only statutory construction.[5] The Wisconsin Court of Appeals reversed without hearing oral arguments. The Wisconsin Court of Appeals did not address constitutional issues because no such issues had been raised.[6]

When Respondents petitioned the Wisconsin Supreme Court for review, Petitioners opposed review by arguing that there are no " 'special and important reasons' for the court's involvement."[7] When the state supreme court agreed

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[3] See Petition at 3 for the text of the general wrongful death law.

[4] Petitioners' Appendix at A-49.

[5] Respondents' Appendix at A-2 contains Petitioners' statement of issues to the Wisconsin Court of Appeals.

[6] The Wisconsin Court of Appeals' decision is reproduced in Petitioners' Appendix at A-38.

[7] The pertinent portions of the Response to Petition for Review are set out in Respondents' Appendix at A-4.

to hear the matter, Petitioners neither briefed[8] nor argued constitutional claims. On June 14, 1990, the Wisconsin Supreme Court issued its unanimous decision[9] affirming the trial court's ruling on the applicable damages cap and reinstating the amount awarded by the jury for loss of spousal society and companionship. The Wisconsin Supreme Court disposed of the issue in exactly the same way as had the trial court, as a straightforward matter of statutory construction. No constitutional issues were discussed by the state supreme court because none had been raised in that court either.

At that point, Petitioners filed a motion for reconsideration[10], arguing for the first time, *Petition* at 11, that the Wisconsin state courts' construction of the medical malpractice statutes violates the equal protection clauses of the Wisconsin and United States constitutions. Respondents opposed reconsideration on the grounds that the constitutional claims were frivolous and because they had not been timely raised in compliance with Wisconsin procedural rules.[11] On September 13, 1990, the Wisconsin Supreme Court denied the motion for reconsideration without opinion.

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[8]Respondents' Appendix at A-7 contains Petitioners' Statement of issues to the Wisconsin Supreme Court.

[9]Petitioners' Appendix at A-1.

[10]Petitioners' Appendix at A-20.

[11]Respondents' Appendix at A-9 reproduces the Memorandum in Opposition to Reconsideration filed in the Wisconsin Supreme Court.

ARGUMENT

I.

THE PETITION SHOULD BE DENIED BECAUSE THE FEDERAL QUESTION WAS RAISED TOO LATE.

In four years of litigation at every level of the Wisconsin courts, Petitioners never raised a constitutional claim. Five times in the state courts they argued about the Wisconsin legislature's special treatment of noneconomic damages in medical malpractice actions involving death without once mentioning a claim based upon equal protection. On the sixth opportunity, and only when certiorari to this Court was their last hope, did Petitioners try to inject a constitutional issue into this case through a motion for reconsideration that was summarily denied.[12]

"Nothing is better settled than it is too late to raise a federal question for the first time in a petition for rehearing after the final judgment of the state court of last resort." *Consolidated Turnpike Co. v. Norfolk & Ocean View Ry. Co.*, 228 U.S. 326, 334 (1913). This Court consistently has followed that rule, except in those few cases where the decision of the state's highest court "unexpectedly" introduced the federal question into the case. *Saunders v. Shaw*, 244 U.S. 317, 320 (1917). The test is whether the federal claim was raised "at the first opportunity." *Missouri v. Gehner*, 281 U.S. 313, 320 (1930). In this case it was not.

In January, 1988, Petitioners first asked the trial court to consider whether the legislature "intended to cap a noneconomic death claim arising from medical malpractice at $1,000,000, while limiting noneconomic death claims

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[12]The Wisconsin Supreme Court refuses to hear constitutional questions raised for the first time on a motion for reconsideration absent compelling reasons for doing so. *State ex rel. Wisconsin Trust Co. v. Phelps*, 172 Wis. 147, 178 N.W.2d 471 (1920); *Sambs v. City of Brookfield*, 66 Wis.2d 296, 314, 224 N.W.2d 582, 592 (1975). As this court has often done in the past, it should refuse jurisdiction in this case, because Petitioners failed to pursue their federal constitutional rights in compliance with reasonable state procedural requirements. *See, Hedgebeth v. North Carolina*, 334 U.S. 806 (1948).

caused by other torts to $50,000."[13] Enroute to his decision, the trial judge wrote:

> Though no challenge has been made under the equal protection clause of the constitution, it appears that such difference was not an abuse of legislative discretion.[14]

At least from that time onward, Petitioners consciously chose to forego the opportunity to pursue issues of federal and state constitutional law. Contrary to their assertions, the case was not "changed in the Wisconsin Supreme Court," *Petition* at 27. As a review of the trial court and state supreme court opinions shows, the state supreme court merely reinstated the trial court's decision by following the trial court's analytical approach. It cannot be argued with candor that the opportunity to raise federal claims first arose after the decision by the state supreme court. The first opportunity to do so then was long past. This fatal jurisdictional defect requires the denial of certiorari in this case.

II.
THE PETITION ALSO SHOULD BE DENIED BECAUSE THE CASE DOES NOT PRESENT AN IMPORTANT FEDERAL QUESTION.

The only real issue in this case is the construction of state statutes: Does the specific state legislation governing claims for injury or death on account of medical malpractice preempt Wisconsin's general wrongful death law? A state court's construction of the state's own statutes is not reviewable by the United States Supreme Court:

> Under the settled rule of this Court, declared so frequently and uniformly as to have become axiomatic, we must accept this decision of the highest court of the State fixing the meaning of the state legislation, as

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[13] Trial court Memorandum of March 8, 1988, Petitioners' Appendix at A-51.

[14] *Id.* at A-53.

> though such meaning has been specifically expressed therein. [Citations omitted.] And we follow the state construction even though it may not agree with our own opinion. [Citations omitted.]

Supreme Lodge, Knights of Pythias v. Meyer, 265 U.S. 30, 32-33 (1923). When the state court's construction of its own state law is involved in a constitutional challenge, this Court is bound to follow that construction. *Guaranty Trust Co. v. Blodgett*, 287 U.S. 509 (1933). Thus, the only question for this Court is whether the Wisconsin law, as interpreted by the Wisconsin Supreme Court, resulted from a constitutionally permissible exercise of legislative authority. It clearly did; and this legislative activity raises no new or important federal questions, as the following cases show.

In *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978), this Court upheld the legislative imposition of liability limitations that were part of a comprehensive scheme for promoting a particular industry while protecting the public. This kind of legislation is "a classic example of an economic regulation"; it is entitled to "'a presumption of constitutionality.'" 438 U.S. at 83 (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1963)). "[S]tatutes limiting liability are relatively commonplace and have consistently been enforced by the courts" because "the 'Constitution does not forbid the creation of new rights or the abolition of old ones recognized by the common law, to attain a permissible legislative objective.'" 428 U.S. at 88 n. 32 (quoting *Silver v. Silver*, 280 U.S. 117, 122 (1929)). After restating these principles, this Court held:

> [W]e conclude that there is no equal protection violation. The general rationality of the Price-Anderson Act liability limitations . . . is ample justification for the difference in treatment between those injured in nuclear accidents and those whose injuries are derived from other causes.

428 U.S. at 93. *Duke Power* dictates the result in this case.

Petitioners admit that they have "no vested interest or property right" in the general wrongful death statute's noneconomic damages limitation. *Petition* at 15. Accordingly, they have no cause for constitutional complaint over that statute's preemption in medical malpractice cases. Even where statutory entitlements are concerned, legislatures have the "power to substitute a different, less valuable entitlement at a later date," *Atkins v. Parker*, 472 U.S. 115, 129 (1985). Legislatures can revise remedies, *Duke Power, supra*. They can reduce or eliminate preexisting causes of action, *Logan v. Zimmerman*, 455 U.S. 422 (1982). And they can redefine a defendant's exposure without offending the Constitution for the same reason.

The Wisconsin Supreme Court observed that Chapter 655 is like a workers' compensation law in that it modifies general civil law in order to meet "specific economic and social needs," *Rineck v. Johnson*, 155 Wis.2d 659, 665, 455 N.W.2d 336, 339 (1990). Healthcare providers under Chapter 655, like employers affected by the workers' compensation laws, are treated differently in furtherance of social policy objectives. More than seventy years ago, in *New York Central Ry. Co. v. White*, 243 U.S. 188 (1917), this Court decided that this type of legislation clearly is constitutional. There is no reason for the Court to exercise its discretionary jurisdiction in order to restate this principle here.

One of the two laws creating this dispute is just a few weeks from sunset. Wisconsin Statutes Section 655.017 (set forth in the Petition at 3) provides that the medical malpractice noneconomic damages caps are only in effect "before January 1, 1991." After the new year, the interaction between Wisconsin's general wrongful death statute and the state's specific medical malpractice laws will present entirely different questions. Under the circumstances, there are absolutely no "special and important reasons" for discretionary review by the United States Supreme Court. Sup. Ct. R. 10.

Even if this case presented an issue of continuing interest in Wisconsin, it would have no national importance. Petitioners admit that the conflict between these two

Wisconsin statutes presents a "narrow framework" for consideration of constitutional questions. *Petition* at 12. However, they contend that it provides an opportunity for solving constitutional problems that are common to the various state statutes addressing medical malpractice. A review of the statutes and cases Petitioners cite shows that, in fact, no other state shares the constitutional "problem" Petitioners raise in this case.

No two states' malpractice laws are identical. Some states have addressed malpractice problems by enacting across-the-board damages limits; others have enacted limits only on noneconomic damages; still others have imposed special procedures for prosecuting claims, but no damages limits.[15] In each instance, these state statutes interact with other peculiar local laws and with particular provisions of the involved state constitutions. As would be expected, the decisions addressing these statutes are equally varied. While Petitioners cite thirty different state caps statutes, they can find only fifteen states in which these statutes faced a constitutional challenge of any kind. *Petition* at 22-23. Of those fifteen local decisions, five decide the constitutionality of the involved legislation solely on *state* constitutional grounds.[16] Two apply the wrong standard of review in analyzing the involved statutes under the United

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[15] A convenient review of state legislative responses to the "malpractice crisis" is found in Smith, "Battling a Receding Tort Frontier: Constitutional Attacks on Medical Malpractice Laws," 35 Def.L.J. 359 (1986). The author concludes: "In short, under the federal constitutional standard, damages caps in medical malpractice actions would almost certainly pass constitutional muster under existing equal protection and due process theories." *Id.* at 389.

[16] *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980); *Kansas Malpractice Victims Coalition v. Bell*, 243 Kan. 333, 757 P.2d 251 (1988); *Lucas v. United States*, 757 S.W.2d 686 (Tex. 1988); *Smith v. Dept. of Ins.*, 507 So.2d 1080 (Fla. 1987); *Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 771 P.2d 711 (1989).

States Constitution.[17] Six involve damages limitations entirely unlike the one encountered in this case.[18] One involves no damages limitations at all.[19] Another involves only a Seventh Amendment challenge to a cap on noneconomic damages in *all* tort cases.[20] The only decision considering a limitation on noneconomic damages in medical malpractice under the United States Constitution while applying the correct ("rational basis") standard of review concludes that such a limitation *is* constitutional.[21] And, as Petitioners admit, no other case involves the relationship between conflicting malpractice and wrongful death damages limitations. Because there is no common constitutional question, there is no issue of national importance. As it has done when asked to enter this field on two prior occasions,[22] the Court should again refuse to do so at this time.

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[17] Petitioners agree that federal equal protection claims involving the kind of socio-economic legislation that is involved here are to be reviewed under a rational basis standard. *Petition* at 14-17. In the following cases, "middle tier scrutiny" was erroneously used to decide federal equal protection questions: *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978); *Jones v. State Board of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied* 431 U.S. 914 (1977).

[18] *Duren v. Suburban Community Hospital*, 24 Ohio Misc.2d 25, 495 N.E.2d 51 (C.P. Ohio 1985)l *Etheridge v. Medical Center Hospital*, 237 Va. 87, 376 S.E. 2d 525 (1989); *Johnson v. St. Vincent Hospital* 404 N.E.2d 585 (Ind. 1980); *Lucas v. United States, supra; Sibley v. Board of Supervisors of L.S.U.*, 462 So. 2d 149 (La. 1985); *Wright v. Central Du Page Hospital Ass'n*, 63 Ill.2d 313, 347 N.E.2d 736 (1976).

[19] *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977).

[20] *Franklin v. Mazda Motor Corp.*, 704 F.Supp 1325 (D.Md. 1989).

[21] *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 211 Cal. Rptr. 368, 695 P.2d 655 (1985), *appeal dismissed* 474 U.S. 892 (1985).

[22] *Jones v. State Board of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976), *cert denied* 431 U.S. 914 (1977); *Fein v. Permanente Medical Group*, 38 Cal.3d 137, 211 Cal.Rptr. 368, 695 P.2d 655 (1985), *appeal dismissed* 474 U.S. 892 (1985).

III.
REMAND IS UNNECESSARY AND IMPROPER.

In refusing to address the constitutional question Petitioners first raised in their motion for reconsideration, the Wisconsin Supreme Court followed longstanding state procedural rules:

> The court has consistently held that it will not entertain a constitutional issue raised for the first time on appeal unless there is some compelling reason for doing so.

Sambs v. City of Brookfield, 66 Wis.2d 296, 314, 224 N.W.2d 582, 592 (1975). In Wisconsin, a claim, made for the first time after the supreme court's decision, that a statute and its application are unconstitutional will not be considered because "the question is presented too late." *State ex rel. Wisconsin Trust Co. v. Phelps*, 172 Wis. 147, 147, 178 N.W. 471 (1920). In determining its own jurisdiction, this Court defers to state requirements for presenting federal constitutional claims. *Hedgebeth v. North Carolina*, 334 U.S. 806 (1948). The same reasonable requirements should apply in addressing a request for remand.

In any event, remand would serve no purpose, other than to further unnecessarily delay this case's resolution. This is not like the situation in the case Petitioners cite, in which remand for fact-finding might avoid a constitutional issue entirely. *Wood v. Georgia*, 450 U.S. 261 (1981). As Petitioners put it, "[t]he material facts of this matter are undisputed." *Petition* at 5. Nor is this a case where the state court refused to address an issue that had been properly raised. *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951). Instead, this case presents a federal constitutional question that the state court refused to hear for good reason, and which this Court has already answered time and time again. Under the circumstances, we respectfully submit that, like the petition for certiorari, the request for remand is equally inappropriate and should be refused.

CONCLUSION

The attempt to inject a federal question on a motion for reconsideration, long after the first opportunity arose, does not confer jurisdiction on this court. The sole issue in this case involves construction of state tort statutes, an area this Court does not approach. No federal constitutional question exists in this case because a state legislature's right to fashion remedies in furtherance of social policy is well settled. The petition should be denied.

Respectfully submitted,

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Court of Appeals of Wisconsin

DISTRICT III

RICKY F. RINECK, Individually, as Surviving Husband of JOY E. RINECK, and as Guardian for RACHEL J. RINECK, a Minor,

Plaintiffs-Respondents-Cross Appellants,

vs.

Case No. 88-1555

LEONARD C. JOHNSON, CRNA, LUTHER HOSPITAL, ST. PAUL FIRE & MARINE INSURANCE COMPANY and WISCONSIN PATIENTS COMPENSATION FUND,

Defendants-Appellants-Cross Respondents,

and

BLUE CROSS BLUE SHIELD UNITED OF WISCONSIN,

Defendant.

APPEAL FROM CIRCUIT COURT
CHIPPEWA COUNTY, CASE NO. 86-CV-378
HONORABLE RICHARD H. STAFFORD, PRESIDING

BRIEF AND APPENDIX OF DEFENDANTS-APPELLANTS

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Supreme Court of Wisconsin

RICKY F. RINECK, Individually, as Surviving Husband of JOY E. RINECK, and as Guardian for RACHEL J. RINECK, a Minor,
Plaintiffs-Respondents-Cross-Appellants-Petitioners,
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Defendants-Appellants-Cross-Respondents,
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BLUE CROSS BLUE SHIELD UNITED OF WISCONSIN,
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RESPONSE TO PETITION FOR REVIEW AND APPENDIX

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The Wisconsin Supreme Court attempts to devote its attention to cases presenting "special and important reasons" for the court's involvement. Sec. 809.62(1), Wis. Stats. Although the Petition for Review in the instant case is repleat with rhetorical flourish arguing the importance of the issues presented, a straightforward analysis of the case reveals that it was decided by the Court of Appeals according to well-settled principles of Wisconsin law. As to each of the three issues raised by the petitioners, the Supreme Court should deny review.

I. THE COURT OF APPEALS PROPERLY APPLIED WELL-SETTLED RULES OF STATUTORY CONSTRUCTION TO RECONCILE PROVISIONS OF THE WRONGFUL DEATH STATUTES AND MEDICAL MALPRACTICE STATUTES.

The Petition for Review correctly reports that the Court of Appeals determined that Sec. 895.04(4), Wis. Stats., limits recovery for loss of society and companionship in a wrongful death action to $50,000.00, in medical malpractice actions as well as other actions for wrongful death. Petitioners somewhat mischaracterize the Decision of the Court of Appeals, however, by seizing the discussion of legislative intent in that decision, as if that were the basis of the Decision. Petition for Review at 11. Petitioners argue that it is important for the Supreme Court to "clarify" what the petitioners contend are conflicting statutory limitations on damages found in Secs. 895.04(4) and 893.55(4), Wis. Stats. Petition for Review at 5.

In point of fact, this issue does not present any strong reason for involvement of the Wisconsin Supreme Court. A plain reading of the Decision of the Court of Appeals demonstrates that the Court of Appeals expressly found the statutes to be not ambiguous and **not** in conflict. Decision of Court of Appeals at 7. Ap. 107. The Court of Appeals used well-settled principles of statutory construction to reconcile the limitation on recovery for loss of society and companionship in a wrongful death action contained in

Sec. 895.04(4), Wis. Stats, with the "cap" placed on noneconomic damages in medical malpractice cases contained in Sec. 893.55(4), Wis. Stats. In other words, there is no need to either "clarify" or "harmonize" any confusion in Wisconsin law. This issue does not meet the criteria for review set forth in Sec. 809.62(1)(c), Wis. Stats.

II. THE ISSUE OF A CHILD'S CLAIM FOR LOSS OF SOCIETY AND COMPANIONSHIP OF A PARENT WHICH PETITIONERS NOW PRESENT TO THE SUPREME COURT WAS NOT PRESENTED TO EITHER THE TRIAL COURT OR THE COURT OF APPEALS.

The petitioners assert that the opinion in *Theama v. City of Kenosha*, 117 Wis.2d 508, 344 N.W.2d 513 (184) gives a minor child a claim for the loss of society and companionship of an injured parent, and then argues that "the lower court's decisions would deny recovery for loss of parental society and companionship in cases where death follows long after the original "injury." Petition for Review at 13, this, the petitioners argue, would "obstruct implementation of the policy established in *Theama*." Petition for review at 13.

Supreme Court of Wisconsin

RICKY F. RINECK, Individually, as Surviving Husband of JOY E. RINECK, and as Guardian for RACHEL J. RINECK, a Minor,
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Defendants-Appellants-Cross Respondents,
and
BLUE CROSS BLUE SHIELD UNITED OF WISCONSIN,
Defendant.

APPEAL FROM THE COURT OF APPEALS OF WISCONSIN (DISTRICT III) AND FROM CIRCUIT COURT CHIPPEWA COUNTY, CASE NO. 86-CV-378 HONORABLE RICHARD H. STAFFORD, PRESIDING

BRIEF OF DEFENDANTS-APPELLANTS-CROSS RESPONDENTS

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Supreme Court of Wisconsin

RICKY F. RINECK, Individually, as Surviving Husband of JOY E. RINECK, and as Guardian for RACHEL J. RINECK, a Minor,
Plaintiff-Respondent-Cross Appellant-Petitioner,

v.

Case No. 88-1555

LEONARD C. JOHNSON, CRNA, LUTHER HOSPITAL, ST. PAUL FIRE & MARINE INSURANCE COMPANY and WISCONSIN PATIENTS COMPENSATION FUND,
Defendants-Appellants-Cross Respondents,
and

BLUE CROSS BLUE SHIELD UNITED OF WISCONSIN,
Defendant.

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR RECONSIDERATION

Arguing that the medical malpractice act, Ch. 655, Stats., is itself constitutional but that following its express directions violates equal protection, defendants ask this court to address constitutional issues for the first time after appeal. Petitioner Rineck opposes this inappropriate request for "reconsideration" for the reasons set forth below.

I.

DEFENDANTS ARE NOT ENTITLED TO RAISE CONSTITUTIONAL ISSUES AT THIS STAGE OF THE CASE.

The dispositive issues on appeal have been at issue since January 1988, when defendants first asked the trial court to consider the relationship between the medical malpractice and wrongful death statutes. The relationship has been considered at least five times by all three levels of this state's courts since then. Although the issues on appeal were first decided more than two years ago, defendants waited until after an adverse decision by the Supreme Court to add that they think there are constitutional problems when the general wrongful death statute is held inapplicable in medical malpractice actions. Constitutional claims were never mentioned, let alone briefed or argued before this court's decision of June 14, 1990. Contrary to Sec. 806.04(11), Stats., the attorney general was never given notice that a constitutional issue was involved; consequently, the attorney general has not participated in this case.

A constitutional issue may be waived by failure to raise it in a timely manner. *Bradley v. State,* 36 Wis.2d 345, 153 N.W.2d 38 (1967). A constitutional issue should not be addressed where the attorney general has not been given notice. *Tieberg v. Ehlke,* 137 Wis.2d 228, 235 n8, 404 N.W.2d 84 (Ct. App. 1987). The Wisconsin Court of Appeals has said that the appellate courts "will not consider an issue raised for the first time on appeal, *especially a claim that a statute is unconstitutional.*" *Tomah-Mauston Broadcasting Co. v. Eklund,* 143 Wis.2d 648, 657-58, 422 N.W.2d 169 (Ct. App. 1988). The Supreme Court has agreed:

> This Court has consistently held that it will not entertain a constitutional issue raised for the first time on appeal unless there is some compelling reason for doing so.

Sambs v. City of Brookfield, 66 Wis.2d 296, 314, 224 N.W.2d 582, 592 (1975) (citations omitted). Applying this rule, the Supreme Court has refused to address constitutional issues

that have not been raised before in the vast majority of cases in which it has been asked to do so. *See, Racine Steel Castings v. Hardy*, 144 Wis.2d 553 nl, 426 N.W.2d 33 (1988); *State v. Marshall*, 113 Wis.2d 643, 335 N.W.2d 612 (1983); *Laufenberg v. Cosmetology Examining Bd.*, 87 Wis.2d 175, 274 N.W.2d 618 (1979); *Chrylser Corp. v. Adamatic, Inc.*, 59 Wis.2d 219, 208 N.W.2d 97 (1973); *City of Milwaukee v. The Shoup Voting Machine Corp.*, 54 Wis.2d 549, 196 N.W.2d 694 (1972); *Resseguie v. American Mut. Liability Ins. Co.*, 51 Wis.2d 92, 186 N.W.2d 236 (1971); *Dostal v. Magee*, 273 Wis. 228, 77 N.W.2d 604 (1956). Rineck respectfully submits that the court should refuse to do so in this case as well.

II.

IT IS WHOLLY INAPPROPRIATE TO ARGUE CONSTITUTIONALITY FOR THE FIRST TIME ON A MOTION FOR RECONSIDERATION.

By its nature, "reconsideration" involves a second look at something seen before. As this court said in *Uren v. Purity Dairy Co.*, 252 Wis. 446, 459b, 33 N.W.2d 213 (1948), where an argument never surfaced before a motion for reconsideration, "there is nothing to reconsider." This court has observed that one of the "well-defined rules applicable on rehearing" is that an issue that was not pled, argued or briefed at any time before "will not properly be at issue" on a motion for reconsideration. *Bump v. Dahl*, 27 Wis.2d 607, 608, 134 N.W.2d 665 (1965). Accordingly, this court has refused to "reconsider" an issue raised at the trial court but abandoned on appeal, *Martinson v. Brooks Equipment Leasing Co.*, 36 Wis.2d 209, 154 N.W.2d 353 (1967); it has refused to "reconsider" an issue that had never before been mentioned, *Hope Acres, Inc. v. Harris*, 27 Wis.2d 285, 134 N.W.2d 462, 135 N.W.2d 775 (1965), *Bump, supra, Uren, supra, State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 61 N.W.2d 300 (1953); and this court specifically has refused to "reconsider" a claim, made for the first time after the Supreme Court's decision, that a statute and its application were unconstitutional, *State ex rel. Wisconsin Trust Co. v.*

Phelps, 172 Wis. 147, 147, 178 N.W. 471 (1920), holding that, after the Supreme Court has ruled, "the question is presented too late." Rineck respectfully submits that the court should reach the same conclusion here.

III.

DEFENDANTS' REQUEST FOR RECONSIDERATION DOES NOT SATISFY THE EXCEPTIONAL CONDITIONS REQUIRED BY THE SUPREME COURT.

Even in those rare instances where this court has considered a constitutional issue raised for the first time on appeal, it has never done so where the issue was raised for the first time on a motion for reconsideration. And, when the court has considered a constitutional issue raised first on appeal, it has required "some compelling reason for doing so," *Sambs, supra* at 314. This court has determined that it will only consider a newly raised constitutional issue "if *it is in the interests of justice* to do so, if both parties have had *an opportunity to brief* the issue, and if there are *no factual issues* that need resolution," *Laufenberg, supra* at 187. The present motion fails this test.

A. The interests of justice.

"The interests of justice" are not served by allowing a party to *intentionally withhold* an issue that has been on the table since before trial and then inject that issue as its "ace in the hole" after losing on appeal. *See, Gasaway v. Pendergrass*, 350 S.W.2d 460 (Ky. 1961) (known trial court error held back "to see if it became an issue"). Defendants made no constitutional claims when questions regarding the relationship between Ch. 655 and the general wrongful death statute originally were presented, and they chose not to make any during post-trial motions or before either of the appellate courts. In fact, when faced with Rineck's Petition for Review, defendants wrote that Supreme Court review was unnecessary because there were "no 'special and important reasons' for the court's involvement" in this case.

Response to Petition for Review at 1. In light of their earlier treatment of these issues, it is difficult to see how defendants can argue that there is "some compelling reason" for addressing them now.

Reconsideration is appropriate where there is an ambiguity in the mandate or opinion, *Johann v. Milwaukee Electric Tool Corp.*, 270 Wis. 573, 579, 72 N.W.2d 401, 405 (1955), or where the court has applied the wrong law or reached the wrong legal conclusion, *Maloney v. Industrial Commission*, 242 Wis. 165, 9 N.W.2d 623 (1943). Reconsideration is not appropriate where the movant has merely dressed his old arguments in new clothes, *Id.*

Calling it an equal protection problem, defendants have simply renewed their old, unsuccessful argument that medical malpractice actions involving death are "actions for wrongful death" governed by the general wrongful death statute. They argue that:

> The court's interpretation of the law divides tort victims *in wrongful death actions* into two classes: victims of health care providers and victims of all other tortfeasors. Since there is no rational basis for the resulting inequities, this interpretation of the law violates . . . equal protection.

Memorandum in Support of Motion for Reconsideration at 2. (Emphasis added.)

Guided by the plain language of Chapter 655, this court determined that medical malpractice cases involving death are *not* "wrongful death actions;" rather, they are part of a *separate class* consisting of all medical malpractice claims regardless whether "injury or death" is involved. The court has not "divid[ed] tort victims in wrongful death actions into two classes;" rather, the legislature has taken malpractice death claims outside the wrongful death statute altogether. Defendants overlook this point and, in doing so, they overlook the fact that it is impossible to simultaneously argue that this legislation is itself constitutional, *Defendants' Memorandum* at 13-14, but that this court's reading of it is not.

Earlier, defendants tried to convince this court that the sole purpose of Chapter 655 was to limit health care providers' liability. They did not succeed. Reading Chapter 655 in its own terms, the court viewed this legislation as a unified system for balancing competing interests. *Rineck v. Johnson,* Slip op. at 7. Judge Stafford reached the same conclusion, *Memorandum Order* dated March 9, 1988 at 3, and no constitutional attack was raised. In order to raise constitutional issues now, defendants simply revert to their unsuccessful argument that Chapter 655's *sole purpose* was capping awards, and they combine that argument with their often argued belief that malpractice death claims are "actions for wrongful death." They contend that by subdividing wrongful death actions into those caused by malpractice and those with other causes, this court creates a classification that is "completely contrary to the legislative purpose" of limiting awards; thus, that classification violates the equal protection clause. *Defendants' Memorandum* at 8-9. They miss the point that, for many reasons, "*the legislature* intended to set medical malpractice cases involving death apart from other death cases to which the general wrongful death statute applies." *Rineck* slip op. at 13. (Emphasis added.)

As defendants' own authority explains, even these old, misguided arguments do not create a constitutional issue. Defendants concede that a statute providing different remedies for malpractice victims is constitutional so long as there is a rational basis for that law, *Defendants' Memorandum* at 6. They cite the court to *State ex rel. Strykowski v. Wilkie*, 81 Wis.2d 491, 261 N.W.2d 434 (1978), which held that Chapter 655 is, in fact, rationally based. They do not attack the constitutionality of Sec. 893.55(4), that part of Chapter 655 which imposes unique noneconomic damages limitations on all medical malpractice claims involving "injury or death," *Defendants' Memorandum* at 13-14. In fact, they cite the court to a California case that upholds the constitutionality of similar malpractice damages limitations, *Fein v. Permanente Medical Group,*

211 Cal. Rptr. 368, 695 P.2d 665 (1985), and to a law review article discussing why Wisconsin's medical malpractice damages limitations are clearly constitutional, *Comment, the Constitutionality of Wisconsin's Noneconomic Damage Limitation*, 72 Marq. L. Rev. 235 (1989).[1]

The authorities defendants cite quite clearly show that, if the legislature had a rational basis for taking malpractice death cases out from under the general wrongful death statute and for imposing unique damages limitations on those actions, that reclassification is constitutional. Having already failed in their effort to convince this court that the legislature intended the wrongful death statute to apply in medical malpractice cases, and having failed to convince this court that the legislature did not intend to treat "injury or death" in the same way under Chapter 655, defendants already have lost the constitutional battle they now try to start. As a result, justice does not require reconsideration of this case.

B. No opportunity to brief and argue.

Wisconsin's appellate courts routinely have refused to consider issues that have not been briefed and argued. *Uren, supra; Bump, supra; State ex rel. Thomson, supra; Martinson v. North Central Life Ins. Co.*, 65 Wis.2d 268, 225 N.W.2d 604 (1975); *City of Milwaukee v. The Shoup Voting Machine Corp., supra; Racine Steel Castings v. Hardy,*

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[1] According to the writer, the legitimate state objectives which the legislature reasonably could have promoted through unique damages limitations applicable to all medical malpractice claims include: assuring continued availability of quality health care, *Comment* at 244; reducing the effect of noneconomic loss awards on insurance rates, *Id.* at 247; promoting settlement by reducing incentives for trial, *Id.* at 247; increasing the collectibility of judgments, *Id.* at 253; and reducing insurance rates, *Id.* at 260 n.158. In its opinion, this court added another reason for reclassifying medical malpractice claims: "Chapter 655 recognizes that there is no logical distinction between injury or death claims arising out of medical malpractice." *Rineck* slip op. at 14. *See, also, Stanhope v. Brown County*, 90 Wis.2d 823, 280 N.W.2d 711 (1979) and *Sambs v. City of Brookfield*, 97 Wis.2d 356, 293 N.W.2d 504 (1980).

supra; Estate of Atkinson, 261 Wis. 481, 484, 53 N.W.2d 185, reh'g den. 261 Wis. 484, 54 N.W.2d 52 (1952); *Platta v. Flatley*, 68 Wis.2d 47, 63, 227 N.W.2d 898 (1975); *Sambs, supra; Laufenberg, supra.* Where this court has agreed to address a constitutional issue raised for the first time on appeal, it has done so only when that issue had been briefed, argued and examined by the Court of Appeals, *In the Interest of Baby Girl K*, 113 Wis.2d 429, 448, 335 N.W.2d 846 (1983); *State v. Popanz*, 112 Wis.2d 166, 332 N.W.2d 750 (1983). Rineck respectfully submits that this court should not depart from this well-founded requirement in the present case.

CONCLUSION

Rearguing their earlier-rejected positions that medical malpractice death cases are "actions for wrongful death" and that the sole pupose of Ch. 655, Stats. was to reduce health care providers' exposure, defendants attempt to inject a new constitutional issue after appeal. To do so, they blame this court for a classification that they call irrational, while simultaneously arguing that the legislation that, in fact, created that classification is rationally based. In support of their arguments, defendants offer authority that clearly indicates there is no real constitutional issue here. The court should see through this untimely request for reconsideration, and the tactical maneuvering that motivates it, and apply the "well-defined rules applicable on rehearing" to reject the defendants' motion so that this case can proceed to its long overdue conclusion.

Dated: July 13, 1990.

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_____

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